

BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION  
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation	)	
of the	)	
	)	
DEPARTMENT OF FAIR EMPLOYMENT	)	Case No.
AND HOUSING	)	
	)	E 97-98-B-6404-00-s
	)	C 98-99-082
v.	)	99-11-P
	)	
STONE INSURANCE SERVICES, INC.	)	
aka STONE COMPANIES,	)	
	)	
Respondent.	)	DECISION
-----	)	
	)	
CYNTHIA MICHELE McLAUGHLIN,	)	
	)	
Complainant.	)	

The Fair Employment and Housing Commission hereby adopts the attached Proposed Decision as the Commission's final decision in this matter. Pursuant to Government Code sections 11425.60 and 12935, subdivision (h), the Commission designates this decision as precedential.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523 and Code of Civil Procedure section 1094.5. Any petition for judicial review and related papers shall be served on the Department, the Commission, respondent, and complainant.

DATED: November 9, 1999

LYDIA I. BEEBE

EUIWON CHOUGH

T. WARREN JACKSON

GEORGE WOOLVERTON

In the Matter of the Accusation )  
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Respondent. )  
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CYNTHIA MICHELE McLAUGHLIN, )  
Complainant. )

The final volume of the transcript was received on July 29, 1999. The Department's opening post-hearing brief was timely filed on September 1, 1999. Respondent's reply brief was timely filed on October 4, 1999. The Department's reply brief was timely filed, and the case was submitted, on October 12, 1999. On October 13, 1999, respondent sent a letter commenting on portions of the Department's reply brief. Later that day, the Department objected in writing to

respondent's October 13 letter as unauthorized surrebuttal. The Department's objection is well taken, and respondent's October 13 letter has not been considered as part of the post-hearing briefing.

After consideration of the entire record and all arguments, the Hearing Officer makes the following findings of fact, determination of issues, and order.

#### FINDINGS OF FACT

1. On November 24, 1997, complainant Cynthia Michele McLaughlin (complainant), filed a written, verified complaint with the Department of Fair Employment and Housing (Department). The complaint alleged that Stone Companies terminated complainant from her bookkeeper position after she had been released to return to work from pregnancy disability leave, in violation of the Fair Employment and Housing Act (Act) (Gov. Code, §12900 et seq.).

2. The Department is an administrative agency empowered to issue accusations under Government Code section 12930, subdivision (h). On November 23, 1998, Nancy C. Gutierrez, in her official capacity at that time as Director of the Department, issued an accusation against respondent Stone Insurance Services, Inc. aka Stone Companies (respondent). The Department's accusation alleged that respondent refused to return complainant to her original position following her pregnancy disability leave, and instead informed her that her position had been eliminated. The accusation also alleged that respondent failed to maintain a pregnancy disability leave policy that complied with the Act, and that respondent failed to take all reasonable steps to prevent discrimination from occurring. The Department alleged that respondent thereby violated Government Code sections 12940, subdivisions (a) and (i), and 12945, subdivisions (a) and (b) (2).

3. Respondent is an insurance brokerage firm in Pasadena, California. Respondent provides insurance, investments, annuities, disability plans, and health benefit plans to closely held businesses in Southern California. Bruce Stone is respondent's President, and owns 30 percent of the company. His father, Lawrence Stone, is respondent's Vice President and Chairman, and owns 70 percent of the company.

In 1997, respondent had five or six employees, and was an employer within the meaning of Government Code section 12926, subdivision (d).

4. In October 1989, respondent hired complainant as a full-time employee to perform bookkeeping duties. Complainant had prior experience in bookkeeping jobs, and had taken accounting courses in high school and college. Complainant's primary duties with respondent were posting journal entries, reconciling statements, maintaining accounts receivable and payable, and preparing the payroll.

5. In the 1980's, respondent had a written pregnancy leave policy as part of its employee handbook. Respondent reduced its workforce after the late 1980's, however, and abolished its employee handbook. Respondent continued to provide leaves to pregnant employees. In the 1990's, complainant and fellow employees Diane Kimbro and Karen Bhatt, among others, took pregnancy leaves. Kimbro took two pregnancy leaves and complainant took three pregnancy leaves.

6. In 1992, complainant requested, and respondent granted, a leave for the birth of her first child, Sean. When complainant informed Bruce Stone of her pregnancy, Stone remarked, "Well, we expect that of women." Respondent hired a temporary employee to replace complainant during her leave. The temporary employee who replaced complainant during her leave left respondent's books in disarray.

7. Upon complainant's return from her 1992 leave, she and respondent mutually agreed to convert her job to a part-time bookkeeper position; complainant worked 12 to 15 hours per week, mainly at home, and came into the respondent's office only once or twice a week. Complainant's duties as respondent's part-time bookkeeper included processing payables, printing checks, producing various reports (profit and loss, budgets, budget variance), and preparing the payroll. The part-time position suited complainant's needs because she wanted to spend more time at home with her child. The new arrangement also suited respondent's needs; respondent's business was down due to the recession, and respondent had less need for bookkeeping services.

8. The accounting firm of Clumeck, Stern, Phillips and Schenkelberg (the Clumeck firm) served as respondent's accountants. Adrian Stern, Certified Public Accountant, was one of the principals of the Clumeck firm, and worked closely

with complainant. Stern and complainant reorganized the bookkeeping records that the temporary employee had left in disarray. Complainant and Adrian Stern had a good professional working relationship.

9. Over the years, the Clumeck firm's services to respondent expanded to include strategic planning, bank loan applications, and selection of accounting software for respondent. The Clumeck firm also began to provide personal accounting services for Bruce Stone, Lawrence Stone, and their families.

10. In 1994, complainant took a second pregnancy leave for the birth of her child, Ryan. She returned to her part-time position after that leave. Respondent hired a temporary bookkeeper to replace complainant while she was on leave. Although the temporary bookkeeper had an M.B.A., he left respondent's books in even worse disarray than had the temporary employee who replaced complainant during her first pregnancy leave. Adrian Stern and complainant expended much effort putting respondent's books back in order.

11. After this second bad experience with a temporary bookkeeper, accountant Adrian Stern began to advise Bruce Stone that respondent was wasting money paying an in-house bookkeeper, and recommended that the Clumeck firm take over respondent's bookkeeping work. Stern also recommended that respondent discontinue its use of ADP, a company that helped process respondent's payroll. Stern told Stone that his firm could do the work more accurately and at less cost.

12. Respondent was in precarious financial condition in the early and mid-1990's, due to the recession and to an increasingly competitive environment in which attorneys, accountants, and banks all sold insurance products and services. Respondent had cash flow problems, and often had to hold checks because it had insufficient funds on deposit. Thus, in addition to recommending that respondent eliminate the bookkeeper position, Adrian Stern also recommended other measures to improve respondent's financial position. These included replacing a secretary/receptionist with voice mail, eliminating or contracting out employee Phil Rothstein's job as analyst and assistant to Bruce Stone and Lawrence Stone, changing to a different fee structure, reducing salaries and bonuses, limiting automobile and entertainment expenses, and reducing respondent's charitable contributions. Bruce Stone and Lawrence Stone implemented some, but not all, of these cost-cutting recommendations.

13. Complainant and her family moved to Chino Hills in August 1995. This resulted in complainant having a longer commute to respondent's office. Complainant sometimes complained about the commute to others in the office.

14. From 1994 to 1997, Adrian Stern continued to advise Bruce Stone to have the Clumeck firm take over respondent's bookkeeping. Bruce Stone was reluctant to eliminate complainant's position because she had been a good, long-term employee.

15. By 1997, Bruce Stone and Lawrence Stone had become concerned about problems with complainant's work; in particular, they were concerned that complainant was not producing timely and accurate profit and loss statements, balance sheets, budgets, and bank statement reconciliations. Complainant had also made insufficient payroll tax deposits to the Internal Revenue Service and the Employment Development Department, causing respondent to pay tax penalties of about \$2,200. Complainant's bookkeeping also required more corrections, or "journal entries," than in the past. Adrian Stern, who had previously considered complainant's work performance good, gradually concluded that complainant's work had become unsatisfactory, and so advised Bruce Stone. Both Stern and Stone discussed complainant's bookkeeping problems with complainant on numerous occasions.

16. In April 1997, complainant informed Bruce Stone that she was pregnant with her third child, and that she would need a pregnancy leave beginning in August. In early August 1997, Bruce Stone gave complainant \$100 so that she and her husband could have dinner to celebrate the impending birth of her child. On August 14, 1997, Bruce Stone gave complainant a \$500 bonus. Complainant began her pregnancy leave on August 14 or 15, 1997. Her child, Collin, was born on August 22, 1997.

17. The Clumeck firm provided bookkeeping services for respondent while complainant was on leave. Respondent did not hire a temporary bookkeeper, since that had caused problems in the past. While complainant was on leave, Adrian Stern discovered that she had not recorded 10 to 25 checks in the two or three months before she left on leave, causing respondent's bank reconciliations for those months to be inaccurate.

18. In September 1997, Bruce Stone decided to eliminate respondent's bookkeeper position, to terminate the

use of the ADP company, and to have the Clumeck firm take over respondent's bookkeeping and payroll work. On September 12, 1997, the Clumeck firm sent a new engagement letter to respondent. Bruce Stone signed and accepted the new engagement letter on September 19, 1997. Under the engagement letter, the Clumeck firm agreed to compile respondent's balance sheet, related statements of income, retained earnings and cash flow, on a quarterly basis. The Clumeck firm also agreed to provide ongoing bookkeeping services, including accounts payable, bank reconciliations, payroll-related services, internal financial statements, and other related bookkeeping functions. The engagement letter recited that the Clumeck firm would require approximately three hours per week to perform these bookkeeping services, and that ADP would be terminated as respondent's payroll provider, effective October 1, 1997. The engagement letter provided that the Clumeck firm would bill respondent for these services at the rate of \$1,500 per month, effective September 1, 1997.

19. On October 3, 1997, Bruce Stone called complainant and informed her that her position had been eliminated. Stone told complainant that respondent had found a better way to do the work. Stone also said that now that complainant had three children, she would not want to make the long commute. Complainant was still on leave at the time of this telephone call. Respondent terminated complainant's employment on October 3, 1997. With the elimination of the bookkeeper position, respondent had reduced its work force by about one-half since 1989.

20. Before her August 1997 leave, respondent paid complainant approximately \$1000 per month, plus about \$140 in cash in lieu of benefits. Respondent also paid the ADP company \$65 per month. In addition, respondent paid the Clumeck firm a monthly retainer of \$1,200. Thus, respondent's cost for bookkeeping, payroll, and accounting was approximately \$2,405 per month. After respondent eliminated the bookkeeping position and stopped using the ADP company, the Clumeck firm performed all of respondent's bookkeeping, payroll and accounting work for a monthly retainer of \$1,500. This saved respondent about \$905 per month, or approximately \$10,860 per year.

21. Since eliminating the bookkeeper position, respondent has not employed another bookkeeper. The Clumeck firm continues to perform the duties formerly assigned to the bookkeeper.

## DETERMINATION OF ISSUES

### Liability

The Department's accusation alleged that respondent refused to return complainant to her original position following her pregnancy disability leave, and instead informed her that her position had been eliminated. The accusation also alleged that respondent failed to maintain a pregnancy disability leave policy that complied with the Act, and that respondent failed to take all reasonable steps to prevent discrimination from occurring. The Department asserts that respondent thereby violated Government Code sections 12940, subdivisions (a) and (i), and 12945, subdivisions (a) and (b) (2).

#### A. Refusal to Permit Complainant to Return from Leave

Government Code section 12945, subdivision (b) (2), requires an employer to provide a pregnancy disability leave of up to four months to a female employee while she is disabled on account of pregnancy, childbirth or related medical conditions. (Gov. Code, §12945, subd. (b) (2); Cal. Code of Regs., tit. 2, §7291.7, subd. (a); Cal. Fed. Savings & Loan Ass'n v. Guerra (1987) 479 U.S. 272; DFEH v. J.E. Robinson, D.D.S. (1993) FEHC Dec. No. 93-02, at p. 9 [1993 WL 726824; 1992-93 CEB 2], on remand from J.E. Robinson v. Fair Employment & Housing Com. (1992) 2 Cal.4th 226; DFEH v. Dimino & Card (1990) FEHC Dec. No. 90-05, at pp. 8-9 [1990 WL 312869; 1990-91 CEB 2].)

Complainant began her third pregnancy leave on August 14 or 15, 1997. In September 1997, while complainant was on leave, respondent entered into a new agreement with the Clumeck firm under which the firm took over respondent's bookkeeping and payroll work, in addition to providing accounting services. Consequently, respondent eliminated complainant's position, and terminated its use of the ADP company. On October 3, 1997, while complainant was still on leave, Bruce Stone called complainant and informed her that her position had been eliminated. Thus, respondent refused to reinstate complainant to her original position, and instead terminated her employment.

Respondent will be held in violation of Government Code section 12945, subdivision (b) (2), unless it can establish an affirmative defense. Our regulations provide

that an employer must reinstate an employee who has taken a pregnancy disability leave to her original position unless the employer can show either, first,

That the employee would not otherwise have been employed in her same position at the time reinstatement is requested for legitimate business reasons unrelated to the employee taking a pregnancy disability leave (such as a layoff pursuant to a plant closure). (Cal. Code of Regs., tit. 2, §7291.9, subd. (c)(1)(A).)

or, second,

That each means of preserving the job or duties for the employee (such as leaving it unfilled or filling it with a temporary employee) would substantially undermine the employer's ability to operate the business safely and efficiently. (Cal. Code of Regs., tit. 2, §7291.9, subd. (c)(1)(B).)

The burden is on the employer to establish these defenses by a preponderance of the evidence. (Cal. Code of Regs., tit. 2, §7291.9, subd. (c)(1).) If either of these defenses is shown, the employer must return the employee to a "substantially similar job" if such a job exists. (Cal. Code of Regs., tit. 2, §7291.9, subd. (c)(2).)

Respondent asserts that its decision to eliminate complainant's position, and its refusal to reinstate complainant, are supported by both the above defenses. Respondent first argues that it had legitimate business reasons unrelated to complainant's pregnancy disability leave for eliminating complainant's position, and thus that it was not obligated to reinstate complainant. (Cal. Code of Regs., tit. 2, §7291.9, subd. (c)(1)(A).)

Adrian Stern had for several years recommended that his accounting firm take over respondent's bookkeeping and payroll work. Although Bruce Stone was reluctant to implement this recommendation, he and Lawrence Stone eventually agreed to it, because of concerns about complainant's work performance and because the new arrangement promised more accurate work at a lower cost. Thus, in September 1997,

respondent and the Clumeck firm entered into a new engagement agreement under which the Clumeck firm took over respondent's bookkeeping and payroll work. Shortly thereafter, respondent eliminated complainant's position and stopped using the ADP company. Respondent saved around \$905 per month by shifting its bookkeeping and payroll work to its accountants. Respondent has not employed a bookkeeper since it eliminated complainant's position.

Over the years, the Clumeck firm played a growing role in respondent's business. Respondent's decision to have the Clumeck firm take over its bookkeeping and payroll work was part of this trend. This allowed respondent to have its bookkeeping and payroll work done more accurately, and at lower cost, by the accounting firm which was an important advisor to the business. These were legitimate business reasons unrelated to complainant's pregnancy disability leave.

The Department points to the timing of respondent's decision to eliminate complainant's position as showing it was related to complainant's pregnancy disability leave. It is true that the position was eliminated while complainant was on leave, but it does not necessarily follow that her position was eliminated because she was on leave. Complainant herself acknowledged that she had no facts indicating that respondent eliminated her position because of her pregnancy leave.

The Department contends that complainant's job did not cease to exist, because respondent's accountants still performed complainant's former duties. The Department further argues that the public policy to protect employees on pregnancy disability leave would be weakened if employers are allowed to "outsource" employees' duties. There is force to the Department's argument. Nevertheless, the regulations state, "An employee has no greater right to reinstatement to the same position or to other benefits and conditions of employment than if the employee had been continuously employed in this position during the pregnancy disability leave or transfer period." (Cal. Code of Regs., tit. 2, §7291.9, subd. (c)(1).) Thus, complainant remained vulnerable to a job elimination during her pregnancy disability leave (as she would have been had she remained on the job) providing respondent had legitimate business reasons unrelated to the pregnancy disability leave for the elimination.

The Department also notes that Adrian Stern recommended numerous other options to save money (see Finding

of Fact 12), and that respondent could have achieved substantial savings by implementing those options rather than eliminating complainant's position. Respondent did take various cost-cutting measures, including reducing its work force. Moreover, the Act and our regulations do not require an employer to select one cost-saving measure over another.

The Department argues that respondent had the burden to prove that it was "impossible" to reinstate complainant to her job, citing DFEH v. J.E. Robinson D.D.S., supra, 1993 CEB 2, at p. 13. There, the Commission commented on the affirmative defenses which allow an employer not to reinstate an employee from pregnancy disability leave (former Cal. Code of Regs., tit. 2, §7291.2, subds. (d)(3)(C)(1)(a) and (b), now renumbered as §7291.9, subds. (c)(1)(A) and (B).), stating,

The FEHA mandates that a woman be allowed to take a pregnancy disability leave and to return to her job following this leave. (Cal. Fed. Savings & Loan v. Guerra, supra, 479 U.S. 272, 288.) In order to give meaning to this mandate, **our regulations are narrowly drawn to excuse an employer from his duty to reinstate such a complainant only in those few situations where, for business reasons unconnected with the woman's pregnancy, reinstatement is proven to be impossible.** (Cal. Code of Regs., tit. 2, §7291.2, subds. (d)(3)(C)(1)(a) and (b).) [Emphasis added.]

The Department's reliance on the Commission's statement is reasonable. Yet it does not appear that the affirmative defenses in our regulations actually require a showing of impossibility, despite the above-quoted passage from the J.E. Robinson decision.<sup>1/</sup> The plain language of the

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<sup>1/</sup> J.E. Robinson was first decided in 1989, and subsequently reissued (with modifications not relevant here) in 1993, on remand from the Supreme Court. The case is the Commission's most recent precedential decision involving the pregnancy disability leave affirmative defenses. In the ten years since the decision was first issued, the Commission has issued numerous non-precedential decisions involving those defenses, some of which have been cited by the Department and respondent in their post-hearing

regulations does not require respondent to prove that it was impossible to reinstate the employee, but instead that it had "legitimate business reasons unrelated to the employee taking a pregnancy disability leave" for eliminating her position and refusing to reinstate her (Cal. Code of Regs., tit. 2, §7291.9, subd. (c)(1)(A)), or that "each means of preserving the job or duties for the employee (such as leaving it unfilled or filling it with a temporary employee) would substantially undermine the employer's ability to operate the business safely and efficiently." (Cal. Code of Regs., tit. 2, §7291.9, subd. (c)(1)(B).).2/

Respondent proved that it eliminated complainant's position for legitimate business reasons unrelated to complainant taking her pregnancy disability leave. Moreover, the Department did not argue, and the evidence did not reveal, that respondent had a substantially similar job to which complainant could have returned. Thus, respondent has proven the affirmative defense in section 7291.9, subdivision (c)(1)(A), of the regulations, and did not violate Government Code section 12945, subdivision (b)(2).3/

#### B. Discriminatory Termination

The Department's accusation alleged that respondent terminated complainant on the basis of her sex and pregnancy, in violation of Government Code section 12940, subdivision (a), which prohibits discrimination on the basis of sex,

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briefs. The Commission has not required a showing of "impossibility" in any of those decisions, even though some find the defenses proven, and even though each decision cites J.E. Robinson. As non-precedential decisions, however, they are not cited here.

2/ Respondent may have lost this issue under an "impossibility" standard. Respondent likely could have delayed transferring its bookkeeper's duties to its accountants until complainant returned from her leave. Respondent had, after all, not made the transition for several years since it was initially proposed.

3/ Since respondent proved the first affirmative defense, this decision need not decide whether respondent also proved the second affirmative defense. (Cal. Code of Regs., tit. 2, §7291.9, subdivision (c)(1)(B).)

including pregnancy. The accusation also alleged that respondent violated Government Code section 12945, subdivision (a), which prohibits a non-Title VII employer from discharging a female employee, because of her pregnancy, from employment and from discriminating against her in compensation or in terms, conditions, or privileges of employment. Because these allegations are intertwined with the Government Code section 12945, subdivision (b)(2), allegation already decided above, and because the Department has not reasserted them in its post-hearing arguments, they will be discussed only briefly.

Complainant testified about two comments made by Bruce Stone. First, when complainant told Bruce Stone about her first pregnancy in 1992, Stone remarked, "Well, we expect that of women." Complainant considered the remark rude and derogatory. The context of this remark was not established, and it occurred about five years before this case arose. There was no showing that the Stone's 1992 remark was connected to complainant's termination in 1997.

Complainant also testified that when Bruce Stone called her on October 3, 1997, he said that now that complainant had three children she would not want to make the long commute. The Department has not argued that this comment revealed sex or pregnancy bias on Bruce Stone's part.

Complainant testified that she did not hear any derogatory remarks about her third pregnancy, and that she had no facts indicating that respondent eliminated her position because of her pregnancy leave. The Department's only other witnesses (complainant's husband, Paul McLaughlin, and accountant Richard Lopez) also did not provide evidence that respondent terminated complainant because of her sex or pregnancy. Thus, the Department has not established that respondent violated Government Code sections 12940, subdivision (a), or 12945, subdivision (a).

### C. Failure to Prevent Discrimination

The Department's accusation alleged that respondent failed to maintain a pregnancy disability leave policy that complied with the Act, and that respondent failed to take all reasonable steps to prevent discrimination from occurring. The Department asserts that respondent thereby violated Government Code section 12940, subdivision (i).

The evidence revealed that respondent previously had a written pregnancy leave policy, and that respondent continued to provide pregnancy leaves even after it did away with its employee handbook and written leave policy. Complainant and several other employees took pregnancy leaves in the 1990's.

The Department notes that the Commission's regulations direct employers to provide notice to their employees of the right to pregnancy disability leave (Cal. Code of Regs., tit. 2, §7291.16), and argues that respondent's failure to post such notice shows a failure to take all reasonable steps to prevent discrimination, in violation of Government Code section 12940, subdivision (i). Respondent is obligated to post the notice described in the regulations. But complainant was aware of her right to pregnancy disability leave, and took three leaves. Under these circumstances, respondent's failure to post the notice did not constitute a violation of Government Code section 12940, subdivision (i).

D. Respondent's Request for Attorney Fees

Respondent argues that the Department's claim in this matter was frivolous, unreasonable and unfounded. Respondent therefore requests that the Department be ordered to pay attorney fees to respondent.

The Act provides for job-protected pregnancy disability leaves. (Gov. Code, §12945, subd. (b)(2).) Employers have the burden of proving an affirmative defense in order to lawfully deny the right to reinstatement from such a leave. (Cal. Code of Regs., tit. 2, §7291.9, subd. (c)(1).) Moreover, the Department reasonably relied on the Commission's most recent precedential decision on the issue, which suggested that an employer had to prove that reinstatement was "impossible." (DFEH v. J.E. Robinson, supra, 1993 CEB 2, at p. 13.) Therefore, the Department's case was not frivolous, unreasonable or unfounded. Respondent's request for attorney fees is denied. (DFEH v. Children's Hospital & Health Center (1987) FEHC Dec. No. 87-24, at pp. 9-11 [1987 WL 114872; 1986-87 CEB 10].)

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ORDER

The accusation is dismissed.

Respondent's request for attorney fees is denied.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523 and Code of Civil Procedure section 1094.5. Any petition for judicial review and related papers should be served on the Department, the Commission, respondent, and complainant.

DATED: October 22, 1999

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STEVEN C. OWYANG  
Hearing Officer